Supreme Court, U. S.
FILED
JUN 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1822

STATE OF INDIANA,
Petitioner,

vs.

HUGH MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

JACK R. O'NEILL
Deputy Attorney General

Attorneys for Petitioner

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6239

C. E. Pauley & Co., Inc., Indianapolis

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions Below	1, 2
Jurisdiction	2
Question Presented For Review	2
Constitutional and Statutory Provisions Involved	2, 3
Statement of the Case	3
Facts Material to the Consideration of the Question Presented	3
Reasons for Allowance of the Writ	3-7
Conclusion	7

TABLE OF AUTHORITIES

Cases

	Page
Israel v. Odom, 521 F.2d 1370 (7th Cir., 1975)	7
Hugh Martin v. State of Indiana, Cause No. S 74-181	3
Martin v. State, 521 F.2d 682 (7th Cir., 1975)	3
Neil v. Biggers, 409 U.S. 188 (1972)	4

Constitutional and Statutory Provisions

Fifth Amendment to the Constitution of the United States	2
Sixth Amendment to the Constitution of the United States	3
28 U.S.C. 1254(1)	1
28 U.S.C. 2254	3

Other Authorities

Rule 19(1)(b) of the Rules of the Supreme Court of the United States	2
Rule 22(2) of the Rules of the Supreme Court of the United States	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

STATE OF INDIANA,
Petitioner,

vs.

HUGH MARTIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner State of Indiana respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in cause number 77-2085 on May 26, 1978, which affirmed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court).

OPINIONS BELOW

The opinion of the Seventh Circuit issued on May 26, 1978 has not been officially reported. Copies of the two opinions issued have been appended hereto at pages A-1 and A-3. The September 23, 1977 Order, Memorandum Opinion, Findings of Fact and Conclusions of Law of the District

Court have not been officially reported but copies have been appended hereto at pages A-4, A-11, and A-12. The Seventh Circuit's opinion dated August 8, 1975 has been reported at 521 F.2d 682 (7th Cir., 1975), and a copy has been appended hereto at page A-14. The September 11, 1974 Order and Memorandum of the District Court have not been officially reported but copies have been appended hereto at page A-20.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of this Court, to review an opinion of the Seventh Circuit which has decided a federal question in a way in conflict with applicable decisions of this Court.

The decision of the Seventh Circuit was entered on May 26, 1978. This Petition is timely in that it is filed prior to the expiration of the thirty (30) day period allowed by Rule 22(2) of this Court.

QUESTION PRESENTED FOR REVIEW

Whether the decision of the Seventh Circuit is in conflict with the decisions of both this Court and the Seventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the following Constitutional and Statutory provisions which are not set out verbatim as the reasons that this writ should be allowed are not directly related to those provisions.

The Fifth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States.

28 U.S.C. § 2254.

STATEMENT OF THE CASE

This Petition arises from the affirmance by the Seventh Circuit of an Order issued by the District Court in the case of *Hugh Martin v. State of Indiana,* Cause No. S74-181 issuing petitioner's writ of habeas corpus and ordering his release from the custody of the State of Indiana.

Facts Material to the Consideration of the Question Presented

On August 22, 1974 Hugh Martin filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the District Court contending a violation of his right to counsel at a pretrial (line-up) identification and that his in-court identification was so tied to the initial unconstitutional identification as to be tainted and inadmissible. The petition was denied for failure to present a constitutional claim.

The Seventh Circuit reversed and remanded to the District Court on August 8, 1975, *Martin v. State of Indiana,* 521 F.2d 682 (7th Cir., 1975), where Martin's petition for writ of habeas corpus was granted on September 23, 1977.

The State of Indiana appealed to the Seventh Circuit and on May 26, 1978 that Court affirmed the Order of the District Court.

REASONS FOR ALLOWANCE OF THE WRIT

When the Seventh Circuit reversed and remanded to the District Court for proceedings consistent with its opinion, it stated at 521 F.2d 686:

> To recapitulate, if upon remand the district court finds either (a) that the lineup was conducted with-

> out counsel after formal charges were preferred or (b) that it was impermissibly suggestive, the court must then conduct a hearing at which the State will have the burden of proving by clear and convincing evidence that the in-court identification was nevertheless reliable.

The District Court found that Martin was not denied the right to counsel at the lineup but that the lineup was conducted in an impermissibly suggestive manner. The State thus had the burden of proving by clear and convincing evidence that the in-court identification was nevertheless reliable. Based upon *Neil v. Biggers,* 409 U.S. 188 (1972), which was cited by the Seventh Circuit, the State carried that burden.

The Seventh Circuit in its Order of May 26, 1978 cites it's opinion in *Martin v. State* 521 F.2d 682, 684, 686 (7th Cir., 1975):

> No evidence was presented at the trial to indicate whether the victim had a good opportunity to view the men robbing the gas station.
>
> . . . [T]he trial judge allowed the identification to stand without a hearing or factual determination as to whether the in-court identification had been tainted by the pretrial line-up.
>
> . . .
>
> The absence in the record of testimony on certain critical points, especially the witness' opportunity to observe his assailants, requires a hearing below on remand.

It should be noted that the Seventh Circuit at that time did not have the trial record before it. 521 F.2d 684, note 1. The Seventh Circuit goes on to say in its May 26, 1978 Opinion that "The trial judge was not bound to view the showing in that record (trial record) as clear and convincing, especially in the light of the previous opinion of this court."

The State relied upon and continues to rely upon *Neil v. Biggers,* especially since it was cited by the Seventh Circuit when the case was reversed and remanded to the District Court. The May 26, 1978 Opinion of the Seventh Circuit is clearly contrary to this Court's decision in *Neil v. Biggers.*

In *Neil v. Biggers* it was noted that the rule under which the Court does not lightly overturn the concurrent findings of fact of two lower federal courts was inapplicable where the dispute is not so much over the elemental facts as over the constitutional significance to be given those facts. 409 U.S. 193, note 3. The present case is nearly identical to *Neil v. Biggers* in its essential elements and this Court is justified in overturning the decisions of the Seventh Circuit and the District Court.

In *Neil v. Biggers* this Court gave full credit to the testimony at the jury trial. It was with this in mind and feeling that the trial record provided clear and convincing evidence that the in-court identification was re iable despite a suggestive pre-trial lineup that the State relied entirely upon the trial record.

> Some of the State's testimony at the federal evidentiary hearing may well have been self-serving in that it too neatly fit the case law, but it surely does nothing to undermine the *State record, which itself fully corroborated the identification.* (Emphasis supplied). 409 U.S. 200.

The factors set out in *Neil v. Biggers* determining whether, under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive are listed below with the relevant testimony of the victim at the trial with reference to the page numbers of the trial transcript (Tr.).

A.

The Opportunity to View at the Time of the Crime and the Witness' Degree of Attention

The victim had ten to twenty minutes to view Martin (Tr.p.214) in a lighted area of a filling station looking at his face the entire time (Tr.p.225).

B.

The Accuracy of the Witness' Prior Description

The victim told police that the perpetrator was a five foot nine inch dark-skinned colored man between thirty two and thirty six years old of stocky build (Tr.p.212). Martin was thirty five years old, five feet eleven inches tall, one hundred and eighty pound negro (Tr.pp.295,296).

C.

The Level of Certainty at the Confrontation

The victim looked only at Martin at the lineup as he was the only one the victim was interested in (Tr.p.209). The victim was sure Martin was the one who shot and robbed him the first time he saw Martin in the lineup and was positive that he would have recognized Martin if he had not been in the lineup (Tr.p.217). The victim was positive that Martin was the man who shot and robbed him and recognized him from the scene of the robbery (Tr.p.223).

D.

Length of Time Between the Crime and the Confrontation

The crime occurred on June 30, 1967 and Martin was identified on October, 1967, four months later. In *Neil v. Biggers* the identification was made seven months after the commission of the crime.

Compare also *Israel v. Odom*, 521 F.2d 1370 (7th Cir., 1975) and *United States ex rel. Pierce v. Cannon*, 508 F.2d 197 (7th Cir., 1974).

The State of Indiana has carried the burden of proving by clear and convincing evidence that the in-court identification was reliable despite a suggestive pre-trial lineup and the decision of the Seventh Circuit is in conflict with the decisions of both this Court and the Seventh Circuit.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

JACK R. O'NEILL
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6239

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2085

HUGH MARTIN,

Petitioner-Appellee,

vs.

STATE OF INDIANA,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. S 74-C-181—ALLEN SHARP, *Judge.*

Argued April 26, 1978—Decided May 26, 1978

Before SWYGERT, *Circuit Judge,* MARKEY, *Chief Judge,** TONE, *Circuit Judge.*

O R D E R

The state had the burden of proving by clear and convincing evidence that the impermissibly suggestive line-up did not render the in-court identification unreliable. As this court said in its earlier decision in this case,

> No evidence was presented at the trial to indicate whether the victim had a good opportunity to view the men robbing the gas station.
>
> . . . [T]he trial judge allowed the identification to stand without a hearing or factual determination as

* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

> to whether the in-court identification had been tainted by the pretrial line-up.
>
> The absence in the record of testimony on certain crucial points, especially the witness' opportunity to observe his assailant, requires a hearing below on remand.

Martin v. State of Indiana, 521 F.2d 682, 684, 686 (7th Cir. 1975).

Despite all this the state, instead of offering the testimony of the victim and the accomplice on these matters, which would have given the trial judge an opportunity to inquire in depth into the reliability of the in-court identification and also make a credibility determination, the state merely offered the trial record. The trial judge was not bound to view the showing in that record as clear and convincing, especially in the light of the previous opinion of this court.

The judgment of September 23, 1977, ordering petitioner Hugh Martin released from state custody, unless within 120 days from the date on which the judgment becomes final, proceedings are instituted to retry the petitioner, is AFFIRMED, with the modification that the judgment shall be considered final for purposes of that judgment upon the filing of the mandate of this court in the District Court.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-2085

HUGH MARTIN,

Petitioner-Appellee,

vs.

STATE OF INDIANA,

Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Indiana,
South Bend Division
No. S 74-C-181
Judge ROBERT A. GRANT

Decided May 26, 1978

Before SWYGERT, *Circuit Judge*, MARKEY, *Chief Judge*,* TONE, *Circuit Judge*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of September 23, 1977, ordering petitioner Hugh Martin released from state custody, unless within 120 days from the date on which the judgment becomes final, proceedings are instituted to retry the petitioner, is AFFIRMED, with the modification that the judgment shall be considered final for purposes of that judgment upon the filing of the mandate of this court in the District Court, in accordance with the order of this Court, entered this date.

* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

HUGH MARTIN
Petitioner
v.
STATE OF INDIANA
Respondent
No. S 74-181

ORDER

Upon consideration of the petition for a writ of habeas corpus filed by the petitioner, Hugh Martin, it is the order of this court that the petition is now GRANTED. The writ of habeas corpus shall issue and the petitioner, Hugh Martin, shall be released from the custody of the State of Indiana, Department of Corrections, unless within 120 days from the date this order becomes final the State of Indiana institutes proceedings to retry the petitioner.

Enter September 23, 1977.

/s/ Allen Sharp
Judge, United States District Court

MEMORANDUM OPINION

In June 1967 an Indiana gas station was robbed and the station attendant was shot. In October of that same year the petitioner, Hugh Martin, was identified at a pretrial lineup as the perpetrator of the crime by the victim. The petitioner requested counsel but his request was denied. On November 17, 1967 the petitioner was initially charged with inflicting physical injury while in the commission of a robbery. I.C. 35-13-4-6. (Burns Ann. Stat. § 10-4101) Subsequently, the petitioner was found guilty by the court and sentenced to life imprisonment. In 1972 the Indiana Supreme Court affirmed his conviction in a 3-2 decision in *Martin v. State,* 258 Ind. 83, 279 N.E. 2d 189 (1972). Thereafter, Martin's successive petitions for a writ of habeas corpus were denied by this court. In 1975 the United States Court of Appeals for the Seventh Circuit reversed and remanded the denial of the writ of habeas corpus by this court and directed this court to determine (1) whether the lineup was conducted without counsel after formal charges were preferred, and (2) whether the pretrial lineup was impermissibly suggestive and if so, this court must then conduct a hearing to determine whether the in-court identification was nonetheless reliable. *Martin v. State of Indiana,* 521 F. 2d 682 (1975). On May 20, 1977 this court held such a hearing.

Petitioner's first issue, that he was denied his right to counsel, can be resolved quickly. In *Kirby v. Illinois,* 406 U.S. 682 (1972), the United States Supreme Court held that a defendant's right to counsel at a pretrial lineup occurs only after formal charges have been filed against him. Therefore, the petitioner in this case was not entitled to counsel at his pretrial lineup if at that time formal charges had not yet been filed against him. While the petitioner states that the lineup occurred after formal charges were filed against him, there is no evidence in the record to support this claim.

On the contrary, at the trial the petitioner himself declared that the lineup took place in October of 1967, (transcript p. 207), while the record reflects that the affidavit for inflicting physical injury while in the commission of a robbery was filed on November 17, 1967. Under these facts and under *Kirby,* supra, the petitioner did not have a right to counsel at the pretrial lineup. For this court to reach a contrary result, as advanced by the petitioner, this court would have to totally disregard the petitioner's sworn testimony at his earlier trial.

Petitioner's second issue, regarding an impermissibly suggestive pretrial lineup, does not lend itself to a quick resolution. Unlike the first issue, the second requires an indepth analysis of the law and a careful and meticulous examination of the facts.

It was first in *Stovall v. Denno,* 388 U.S. 293 (1967), that the United States Supreme Court held that a defendant

could claim that a pretrial confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." Id, at 301-302. The court went on to hold that this must be determined by "the totality of the circumstances." Id at 302. Later, in *Simmons v. United States*, 309 U.S. 377 (1968), the Supreme Court again declared that convictions based upon eyewitness identification at trial following a pretrial identification procedure will only be set aside if the pretrial identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id at 384.

The obvious concern with suggestive pretrial identification procedures is misidentification. As Mr. Justice Brennan said, writing for the majority, in *U.S. v. Wade*, 388 U.S. 218 (1967):.

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' Wall, Eyewitness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.
>
> Moreover, '[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial. (footnotes omitted) Id at 288-229

While suggestive pretrial identification procedures are subject to attack as violating due process, as a result of *Stovall*, supra, it wasn't until *Neil v. Biggers*, 409 U.S. 188 (1972), that the Supreme Court expanded upon the phrase "the totality of the circumstances," which was first used in *Stovall*. In *Neil*, the Supreme Court listed five factors to be considered when viewing the "totality of the circumstances." Those factors are:

1. The opportunity to view the criminal at the time of the crime.
2. The witness' degree of attention.
3. The accuracy of the witness' prior description.
4. The level of certainty demonstrated at the confrontation.
5. The length of time between the crime and the confrontation. Id at 199-200.

In addition to these factors, the Seventh Circuit Court of Appeals has noted three different aspects of the "totality of the circumstances." They are:

1. The *suggestive* aspects of the police procedures.
2. The *justification* for using a suggestive procedure.
3. The *reliability* of the identification. *U.S. ex rel Kirby v. Sturgis*, 510 F. 2d 397 (1975).

In the present case the undisputed facts are as follows:

1. The crime took place during the evening of June 29, 1967. It lasted approximately 10-20 minutes, most of which was consumed in a scuffle in which the victim was shot.
2. The victim described one of his assailants as being a "dark-skinned colored man", approximately 5′ 9″ tall, heavy built, and between 32 and 36 years old.
3. Approximately four months later a lineup was conducted in which the defendant/petitioner participated.
4. At the lineup:
   (a) 12 people participated.
   (b) of the 12, ten were Caucasian.
   (c) Of the ten Caucasian, two were women.
   (d) The only other Black besides the defendant was 18 years old and 5′ 3″ tall.

(e) Only the defendant was requested to speak.

(f) Only the defendant was earing prison type clothing.

Apply these facts to the factors listed in *Neil*, supra, this court is led to the conclusion that the pretrial lineup was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Storall* at 301-302.

1. The opportunity to view at the time of the crime was brief at best. The victim testified the crime took between 10-20 minutes, much of which was consumed by a scuffle.

2. The Witness' degree of attention was neither long nor intense. There is evidence he had been working for ovr 12 hours prior to the crime. In addition, the witness' attention was divided between his assailants during the short period of time the crime took place.

3. The accuracy of the witness' prior description is very general due to in part, no doubt, the victim's distraction at the time of the crime and an insufficient amount of time to make a more thorough observation.

4. The level of certainty at the confrontation is highly suspect given the composition of the lineup.

5. The length of time between the crime and the confrontation is approximately four months. This is a substantial amount of time. Clearly this is sufficient time for the victim's mind to become cloudy and faint on the details and further enhance the possibility of a misidentification. Further, coupling the short observation time at the scene of the crime, 10-20 minutes, with this long period before pretrial confrontation, approximately four months, the likelihood of misidentification becomes less a possibility and more a probability.

The Seventh Circuit Court of Appeals in addressing the issue of impermissively suggestive pretrial identification has, after applying the "totality of circumstances" test in several cases, found no violation of the defendants' due process rights. However, each of these decisions are factually distinguishable. In *United States v. Kimbrough*, 528 F. 2d 1242 (1976), the crime was assault with intent to steal mail. The critical time between the crime and the pretrial

identification was less than one day. In *Israel v. Odom*, 521 F. 2d 1370 (1975), the crime was rape. The time period between the crime and the pretrial identification was one day. In *U.S. ex rel Kirby v. Sturgis*, 510 F. 2d 397 (1975), the crime was robbery. The time between the crime and the pretrial identification was two days. In *U.S. ex rel Pierce v. Cannon*, 508 F. 2d 197 (1974), the crime was robbery. The time period between the crime and the pretrial identification was less than one day. In all of these cases the distinguishing fact was the time period between the crime and the pretrial identification. In these cases it was either within one or two days of the crime. But in the present case approximately four months had elapsed.

In accord with the directions in *Martin v. State of Indiana*, 521 F. 2d 682 (1975), the State was given an opportunity to show this court that even if the pretrial identification was impermissibly suggestive that the in-court identification was nevertheless reliable. On May 20, 1977 such a hearing was held but the State declined to put on any evidence. It chose to rely on the transcript of the earlier trial and argue from the record. Since no new evidence was presented and since this court has made an exhaustive study to the transcript and the record, it is the opinion of this court that the State of Indiana has failed to meet its burden of proving by "clear and convincing" evidence that the incourt identification was nevertheless reliable.

Furthermore, since the only other identification testimony came from an alleged accomplice, a traditionally suspect source, (the alleged accomplice was never charged with this crime or given immunity, and raised serious credibility questions), this court cannot hold that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1972).

This Judge of this court has no desire to unduly and improperly interfere with the ordinary processes of criminal justice of the State of Indiana and will not do so except where the constitutional and statutory obligations of this court compel the same. In this case such obligations compel the action taken and the result reached.

Therefore, in light of the foregoing, the petitioner's, Hugh Martin, petition for a writ of habeas corpus is

GRANTED and the writ shall issue unless within 120 days from the date this order becomes final the State of Indiana institutes proceedings to retry the petitioner.

In accord with this memorandum separately entered findings and conclusions are entered.

Enter September 23, 1977.

/s/ Allen Sharp

Judge, United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

HUGH MARTIN, *Petitioner*

v.

STATE OF INDIANA, *Respondent*

No. S 74-181

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This action is a petition for writ of habeas corpus alleging violation of Sixth and Fourteenth Amendment rights.

2. The action is before this Court on remand from the Seventh Circuit Court of Appeals.

3. This Court, was directed that if it found either (a) that defendant participated in a lineup without counsel after formal charges were preferred or (b) that the lineup was impremissibly suggestive, to conduct a hearing at which the State would have the burden of proving by clear and convincing evidence that the in-court identification of defendant was reliable.

4. A hearing was held on May 20, 1977.

5. The underlying offense took place at the Wake-up Service Station located at 1301 East 34th Street in the City of Indianapolis, County of Marion, in the State of Indiana, and Robert L. Davis, an employee of the Wake-up Service Station, was on duty at the time.

6. Robert L. Davis was not acquainted with Hugh Martin.

7. The robbery took place between ten and 20 minutes, a large portion of which time was consumed in a scuffle in which Robert L. Davis was dragged into a restroom of the gasoline station and shot.

8. Robert L. Davis' description of the man who shot him was a "dark-skinned" Negro who was the shorter of the two men who robbed him.

9. Prior to being formaly charged with the offense, Hugh Martin participated in a lineup at the City-County Building in Indianapolis, Marion County, Indiana.

10. The lineup took place approximately four months after the commission of the crime.

11. At the lineup:

a. 12 people participated.
b. Of the 12, ten were Caucasian.
c. Of the ten Caucasians, two were women.
d. The only other Negro was 18 years old and five foot three inches tall.
e. Hugh Martin was the only one who was requested to speak.
f. Hugh Martin was the only one who was requested to state his name, his address, where he worked, and what he was in the lineup for.
g. Hugh Martin was the only one wearing prison-type garb.

12. Robert L. Davis was told by detectives to come down to the lineup to identify the man who shot him.

13. Robert L. Davis picked Hugh Martin out of the lineup.

14. Robert L. Davis subsequently identified Hugh Martin in court at Hugh Martin's trial.

15. Prior to the lineup, Hugh Martin requested the assistance of counsel at the lineup, but his request was refused, and the lineup was conducted during which Hugh Martin was not represented by counsel.

CONCLUSIONS OF LAW

1. Since Hugh Martin participated in the lineup before formal charges were filed he was not entitled to counsel and consequently he was not denied the right to counsel.

2. The lineup was conducted in such a manner as to be so unnecessarily suggestive and conducive to irreparable

mistaken identification that Hugh Martin was denied due process of law.

3. The in-court identification by Robert L. Davis of Hugh Martin was based on and tainted by the pretrial lineup and was thus unreliable.

4. The State of Indiana has failed to meet its burden of proving by clear and convincing evidence that the in-court identification is nevertheless reliable.

5. A writ of habeas corpus should issue and the petitioner, Hugh Martin, should be discharged from the custody of the State of Indiana, Department of Corrections, unless within 120 days from the date this order becomes final, the State of Indiana institutes proceedings to retry the petitioner.

Enter September 23, 1977.

/s/ Allen Sharp

Judge, United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 74-1941

HUGH MARTIN,

Petitioner-Appellant,

v.

STATE OF INDIANA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Indiana,
South Bend Division
No. S 74-C-181

GEORGE N. BEAMER, *Chief Judge.*

Argued April 25, 1975—Decided August 28, 1975.

Before CUMMINGS, STEVENS and TONE, Circuit Judges.

PER CURIAM.

This appeal is from the dismissal of a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254.

In 1967, an Indiana gas station was robbed and the station attendant was shot. On November 17th of that year, petitioner was initially charged with those offenses. At his bench trial, the State established petitioner's identity through the testimony of the victim and an alleged accomplice. He was convicted of inflicting physical injury while in the commission of a robbery in violation of Burns Ann. Stat. § 10-4101. The conviction was affirmed by the Indiana Supreme Court in a 3-2 decision. *Martin v. State*, 258 Ind. 83, 279 N.E.2d 189 (1972). Thereafter, Martin's successive petitions for a writ of habeas corpus were denied by the district court.

According to the facts set forth in the Indiana Supreme Court decision, petitioner had been originally identified by

the victim at a pretrial lineup at the police station about three months after the robbery.[1] At the lineup, he was allegedly denied counsel. Petitioner testified at trial that he was one of two blacks out of twelve men in the lineup. The victim testified that petitioner was the only person in the lineup dressed in prison garb. Petitioner is almost six feet tall, approximately nine inches taller than the only other black in the lineup. The victim described the person who shot him as the shorter of the two robbers and as a dark-skinned Negro. At the trial it developed that the petitioner is taller than his alleged accomplice and is a light-skinned Negro. See quotation *infra*, at 685. No evidence was presented at the trial to indicate whether the victim had a good opportunity to view the men robbing the gas station. The prosecution did not introduce evidence of the pretrial lineup. The alleged accomplice identified petitioner at trial as the one who shot the gas station attendant during the robbery.

At the trial, an objection was made to the victim's identification of petitioner because of asserted taint from the pretrial lineup, allegedly conducted without counsel and in a suggestive manner. A motion to strike was made. However, the trial judge allowed the identification to stand without a hearing or factual determination as to whether the in-court identification had been tainted by the pretrial lineup. The court sentenced the petitioner to life imprisonment.

On appeal to the Indiana Supreme Court, the majority opinion acknowledged that there was evidence tending to show that the in-court identification was tainted by the lineup identification, so that a hearing to resolve the issue would normally have been essential. 279 N.E.2d at 191. Nevertheless, instead of ordering a new trial or remanding the case, three members of the court concluded that the uncorroborated testimony of the accomplice identifying petitioner as the other robber and as the assailant of the attendant sufficed to affirm the conviction. The two dissenting justices favored a remand in order to determine whether

[1] The Indiana trial court is not in the record before us, nor was it before the district court.

the in-court identification was tainted by the pretrial identification. 279 N.E.2d at 192-194.

In July 1973, petitioner filed his first application for a writ of habeas corpus. The district court denied the petition for failure to present a constitutional claim, reasoning that the legality of the pretrial identification was moot since the Indiana Supreme Court had found other sufficient grounds to support the conviction.

A second petition for writ of habeas corpus was filed on August 22, 1974, raising the same bases for relief. Treating the petition as a motion to reconsider, the district court denied it in a memorandum opinion of September 11, 1974. Judge Beamer held that since "the State supreme court has ruled that the conviction must stand regardless of the outcome on the constitutional issue, that issue represents a moot point; a decision thereon can in no way affect the outcome of the case." Therefore, relief was denied. We reverse.

Correct Harmless Error Standard

First of all, petitioner asserts that his Sixth Amendment right to counsel was violated because he was denied counsel by the police at his post-arrest lineup before the robbery victim. Petitioner relies upon *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, as he did on appeal in the Indiana courts. The Indiana Supreme Court accepted his argument, although finding it to be harmless error, without mentioning whether the record revealed whether the lineup took place subsequent to the filing of charges against petitioner and without citing *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411. See discussion *infra*, under the next heading. Petitioner next argues that the lineup was unnecessarily suggestive in violation of the due process clause of the Fourteenth Amendment. See *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199. The Indiana Supreme Court recognized this possibility by stating in its opinion affirming his conviction:

> "There was also testimony indicating a strong possibility the lineup was conducted in an overly suggestive manner. The witness testified that the only member of the lineup he could remember wearing a jail uniform was the appellant. The appellant, who is a Negro, five feet eleven inches tall, and about thirty-five years old testified that of the approximately twelve people in the lineup the only other Negro was five feet three inches tall and eighteen years old." (279 N.E.2d at 191.)

The Indiana Supreme Court assumed that the victim's in-court identification had been impermissibly tainted by a constitutionally infirm lineup and relying on the identification testimony of the accomplice, held that "even without the in-court identification by the victim the evidence is sufficient for the judge of the trial court, as the trier of fact in this case, to find that the identification of the appellant was established." 279 N.E.2d at 192. On this basis, it affirmed the conviction.

[1] Assuming, as did the Indiana Supreme Court, that the lineup was constitutionally infirm and that it tainted the victim's in-court identification or made it unreliable, the proper harmless error standard to apply can be found in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, where the Court held: "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Despite the recognition of the proper harmless error standard by the dissenters (279 N.E.2d at 193), the Indiana Supreme Court applied a simple sufficiency of the untainted evidence test.

[2] Had the majority applied the proper test, they could not have affirmed, given their assumptions. There is no way that the state could establish beyond a reasonable doubt that the trial judge, as the trier of fact, did not rely in some measure upon the in-court identification of the petitioner by the victim. This is especially true in a case such as this one, where the trial judge received the victim's identification testimony despite the defense argument that it should be excluded as tainted and where the only other identification testimony came from an alleged accomplice, a traditionally suspect source. See *Martin v. State*, *supra*, at 193 (DeBruler, J., concurring and dissenting in part).

Thus the district court's reliance on the Indiana Supreme Court's opinion was error.

Petitioner's Right to Counsel Attack on the Lineup

[3-5] The record before us does not reveal whether the lineup was before or after the filing of formal charges against petitioner. At oral argument the parties were unable to agree on this question. Whether petitioner's Sixth Amendment right to counsel was violated at the lineup may depend on the timing of the formal charges. *Kirby v. Illinois, supra.* Accordingly, this case must be remanded to the district court for a determination whether there were formal charges pending against petitioner at the time of the lineup. See *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770; *Cooper v. Piccard*, 428 F.2d 1351 (1st Cir. 1970). If the hearing establishes the Sixth Amendment violation, further proceedings must be held to permit "the Government the opportunity to establish by clear and convincing evidence that the in-court identification [was] based upon observations of the suspect other than the lineup identification." *United States v. Wade, supra*, 388 U.S. at 240, 87 S.Ct. at 1939. Should the Government fail to meet this burden, petitioner will be entitled to relief.

Petitioner's Due Process Attack on the Lineup

[6] The testimony at the trial, as summarized by the Indiana Supreme Court, reveals that the lineup was sufficiently suggestive to warrant further analysis. Contrast *United States v. Bowie*, 515 F.2d 3 (7th Cir. 1975). The absence in the record of testimony on certain crucial points, especially the witness' opportunity to observe his assailant, requires a hearing below on remand. See *Townsend v. Sain, supra.*

[7] If the victim's in-court identification is reliable despite his participation in a suggestive lineup, there is no deprivation of due process and thus the harmless error question need never be reached. See *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401; *Simmons v. United States*, 390 U.S. 377, 385-386, 88 S.Ct. 967, 19 L.Ed. 2d 1247; *Coleman v. Alabama*, 399 U.S. 1, 4, 90 S.Ct. 1999, 26 L.Ed.2d 387; *Stovall v. Denno*, 388 U.S. 293, 301-302, 87

S.Ct. 1967, 18 L.Ed.2d 1199; *Israel v. Odom*, 521 F.2d 1370 at 1375 (7th Cir. 1975); *United States ex rel. Kirby v. Sturges*, 510 F.2d 397, 404, (7th Cir. 1975); *United States ex rel. Pierce v. Cannon*, 508 F.2d 197, 203 (7th Cir. 1974).

[8] The recent authoritative interpretations in this Circuit, listed *supra*, of the Supreme Court's cases relating to identification and due process make it unnecessary to outline the proper approach to be taken in the district court on remand. The proper factors to be considered are well outlined in our previous cases.[2] Should the district court discover on remand that the petitioner's Sixth Amendment right to counsel was violated at the lineup, the factors used to determine whether the in-court identification was tainted thereby are much the same as the factors which the aforementioned precedent list for consideration of the due process issue. See *United States v. Wade, supra*, 388 U.S. at 241, 87 S.Ct. 1926. Thus an examination of such factors may serve a dual purpose.

[9] To recapitulate, if upon remand the district court finds either (a) that the lineup was conducted without counsel after formal charges were preferred or (b) that it was impermissibly suggestive, the court must then conduct a hearing at which the state will have the burden of proving by clear and convincing evidence that the in-court identification was nevertheless reliable.

Reversed and remanded for proceedings consistent with this opinion.

---

[2] Some of the factors that are deemed relevant by the pertinent precedent are addressed in the opinion of the Indiana Supreme Court. 297 N.E.2d at 190-191. The three-month delay between the incident and the lineup, the discrepancy between the victim's description of his assailant and the petitioner's appearance, and the victim's uncertainty when shown a number of photographs prior to the lineup are all indicia of the reliability of the identification.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

HUGH MARTIN
Petitioner
v.
STATE OF INDIANA
Respondent
} Civil No. S 74 181

ORDER

Petitioner filed this current petition for a writ of habeas corpus on August 22, 1974. In that it alleges bases for relief in no way dissimilar to a prior petition for habeas corpus filed July 23, 1973, and denied October 2, 1973, this Court must treat the current petition as a motion to reconsider the prior petition. Here, as there, the petition for relief must be DENIED for a failure to present a constitutional claim. 28 U.S.C. § 2254(a).

Enter: September 11, 1974.

/s/ George N. Beamer
Judge, United States District Court

MEMORANDUM

As in his initial petition for writ of habeas corpus, filed July 23, 1973, and denied October 2, 1973 (Civil No. 73 S 152), petitioner claims that the life sentence that he is now serving followed a trial wherein certain evidence was admitted in violation of his constitutional right to counsel at pretrial (line-up) identification. Petitioner contends that certain in-court identification of him as the perpetrator of the crime was so tied to the initial unconstitutional identification as to be the tainted fruit thereof, and inadmissible against him. He argues that there was insufficient, independent bases for the in-court identification such that

there was no purge of the primary taint. Secondly, petitioner claims that without this evidence against him there is insufficient evidence to support his conviction as a matter of law. He attacks other testimony against him as being worthy of little or no consideration in that it was the testimony of an accomplice to the crime who allegedly attempted to extort payment from petitioner for silence.

The Indiana Supreme Court has ruled upon these very contentions. After thorough consideration, that court concluded that even if the pretrial confrontation without counsel was beyond permissible constitutional limitations, such that refusal to strike the testimony as to the in-court identification was error, sufficient evidence existed nonetheless to support petitioner's conviction. *Martin v. State*, — Ind. —, 279 N.E.2d 189 (1972). In that the State supreme court has ruled that the conviction must stand regardless of the outcome on the constitutional issue, that issue represents a moot point; a decision thereon can in no way affect the outcome of the case. Courts established under Article III of the Constitution of the United States are prohibited from consideration of moot points in that mootness destroys the "case or controversy" required as a matter of constitutional law. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

Petitioner would have this Court reconsider the issue of the sufficiency of the evidence, with a focus on the weight to be given the testimony of his accomplice. This Court cannot reconsider issues relating to the sufficiency of the evidence supporting a conviction in that such is a matter of state concern; it does not rise to the constitutional dimensions required by 28 U.S.C. § 2254(a) for federal review of habeas corpus petitions by state prisoners. *United States ex rel. Griffith v. Martin*, 409 F.2d 1300 (2nd Cir. 1969).

Absent a substantial constitutional claim, this Court is without power to grant relief to a state-held habeas corpus petitioner. The motion to reconsider is therefore denied.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1822

State of Indiana, Petitioner

vs.

Hugh Martin, Respondent

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT, HUGH
MARTIN, IN OPPOSITION TO THE GRANTING
OF THE PETITION FOR A WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
JUL 18 1978
MICHAEL RODAK, JR., CLERK

John R. Obenchain
Counsel for Respondent
1800 American National Bank
Building
South Bend, Indiana 46601
Telephone: (219) 233-1194

The State of Indiana in its petition to this Court for a Writ of Certiorari states that this Court has jurisdiction based on their allegation that the Seventh Circuit decided a Federal question in a way in conflict with this Court's ruling in Neil v. Biggers, 409 U.S. 188 (1972).

The State concedes that the pretrial lineup was unnecessarily suggestive as found by the District Court and affirmed by the Seventh Circuit. The State then asserts that it carried its burden of showing, by clear and convincing evidence, that the in-court identifications were reliable, despite its suggestive pretrial lineup, by relying entirely upon the trial record and chose to adduce no additional testimony at the District Court habeas

corpus hearing. The State's sole contention, as shown on pages 6 and 7 of its petition, is that based on the factors set forth by this Court in Neil v. Biggers, supra, the Seventh Circuit's holding that the State did not carry the burden of proof by clear and convincing evidence, that the in-court identification was reliable despite a suggestive pretrial lineup, was clearly erroneous; and, therefore, was in conflict with this Court's decision in Neil v. Biggers, supra.

We submit to the Court that when the facts of this matter are examined and compared with the factual situation present in Neil v. Biggers, supra, it can be seen that the facts are readily distinguishable. This Court in Neil v. Biggers, supra, held that the consideration of the respondent's due process claim turned upon the facts of the crime and of the identification. When the facts of this matter are considered in light of the factors set forth by this Court in Neil v. Biggers, supra, it can be seen that the lower Federal Courts were justified in finding that the State failed to sustain its burden of showing by clear and convincing evidence that the in-court identification was reliable despite the suggestive pretrial lineup.

Since a factual determination is involved, the factors set out by this Court in Neil v. Biggers, supra, are listed below, together with a comparison of the relevent evidence in this matter and in Neil v. Biggers, supra.

1. Opportunity of the witness to view the criminal at the time of the crime.

A. Martin: The robbery took from ten to twenty minutes [Tr.p.215], and a large portion of the time was consumed in the scuffle in which Mr. Davis was dragged into a restroom and shot. [Tr.p.197] There were two (2) assailants involved and there is no evidence in the record as to exactly how good an opportunity Mr. Davis had to observe either or both of his assailants or just when the shooting occurred during the course of the robbery. Also, the record is not totally clear as to just how well-lighted the area was.

B. Neil v. Biggers: The crime involved was rape, one of the most personally humuliating of all crimes, a crime in which the victim and the assailant must necessarily come into close physical contact. The victim spent up to one-half hour with her assailant under adequate artificial light and under a full moon, and at least twice faced him directly and intimately. The victim testified at the habeas corpus hearing that there was something about his face that she could never forget.

2. The accuracy of the witness' prior description.

A. Martin: Robert J. Davis, the victim, stated that the man who shot him was a "dark-skinned negro", [Tr.p.205] who was the shorter of the two involved in the robbery [Tr.p.197], but the testimony and the evidence at the trial revealed that Hugh Martin was the taller [Tr.p.270] and the lighter [Tr.p.328] of the two. The Trial Court took judicial notice of the fact that Hugh Martin is at least an inch and one-half or two inches taller than the accomplice [Tr.p.270].

B. Neil v. Biggers: The victim's description to the police included the assailant's approximate age, height, weight, complexion, skin texture, build and voice, and the Court found that it was more than ordinarily thorough. The victim testified that she had "no doubt" that the respondent was the person who raped her. The victim's description closely fit the actual description of the respondent.

3. The witness' degree of attention.

A. Martin: The victim's attention was necessarily divided among two (2) assailants and a large portion of the time was consumed in a scuffle in which the victim was dragged into a restroom and shot. [Tr.p.197] There is no evidence as to exactly how good an opportunity the victim had to observe either or both his assailants or exactly when during the course of the robbery the shooting took place.

B. Neil v. Biggers: The victim was no casual observer, but rather the victim of one of the most personally humiliating of all crimes, which involves close face-to-face physical contact.

4. Level of certainty demonstrated by the witness at the confrontation.

A. Martin: As the District Court stated in its memorandum opinion dated September 23, 1977, the level of certainty at the confrontation is highly suspect given the composition of the lineup. The District Court in that opinion found that any certainty of identification at the lineup was caused by the suggestiveness of the lineup itself. The following facts are pertinent concerning the conduct of the lineup:

(a) Twelve (12) people were involved in the lineup [Tr.p.208];

(b) Of the twelve (12), ten (10) were caucasian [Tr.p.302];

(c) Of the ten (10) caucasians, two (2) were women [Tr.p.214];

(d) The only other negro was eighteen (18) years old [Tr.p.302] and five feet three inches (5'3") tall [Tr.p.302];

(e) Hugh Martin was the only one who was requested to step forward [Tr.IIp.9];

(f) Hugh Martin was the only one who was requested to speak [Tr.IIp.9];

(g) Hugh Martin was the only one who was requested to state his name, address, where he worked, and what he was in the lineup for [Tr.IIp.9];

(h) Davis was told by detectives to come down to the lineup to identify the guy that shot him [Tr.p.220];

(i) When Davis went down to the lineup, he was only interested in the man who shot him and he was looking for a man named "Martin" [Tr.p.222];

(j) Davis had heard the name of Hugh Martin being the name of the man who shot him prior to the lineup [Tr.p.226];

(k) Davis' identification was made certain by Martin's presence in the lineup. There was no question about that. [Tr.p.224];

(l) Hugh Martin was the only one wearing prison-type garb [Tr.p.201].

Despite the fact of the suggestiveness of the pretrial lineup, Mr. Davis did not immediately identify Martin at the lineup [Tr.p.216]. Mr. Davis, on the day following the robbery, was shown a group of fifteen (15) to twenty (20) pictures by the police and he picked out several people from the mug shots that looked like the man who shot him. [Tr.p.227] The State, at the habeas corpus hearing, adduced no testimony regarding the certainty of identification at the time of the crime.

B. Neil v. Biggers: The victim testified that she had "no doubt" about her identification. At the habeas corpus hearing, she elaborated in response to questioning that she had no doubt that when she first laid eyes on him she knew it was the individual, because there was just something about his face that she could never forget. The victim had also viewed several suspects at the police station, some in lineups and some in showups, and was shown between thirty (30) and forty (40) photographs, prior to the show-up in question, and she identified none of the suspects prior to identifying Mr. Biggers.

5. Length of time between the crime and the confrontation.

A. Martin: The identification was made at least four (4) months after the commission of the crime.

B. Neil v. Biggers: The identification was made seven (7) months after the commission of the crime. However, this Court stated that a lapse of seven (7) months would be a seriously negative factor in most cases. There, however, the testimony was undisputed that the victim made no previous identification at any of the showups, lineups or photographic showings.

CONCLUSION

The facts of the present case are clearly distinguishable from those present in Neil v. Biggers, supra. When the facts of this matter are applied to the factors set forth by this Court in Neil v. Biggers, supra, it is shown that there is substantial evidence in the record to support the lower court's finding that the State did not carry its burden of proving by clear and convincing evidence that the in-court identification was reliable despite the suggestive pretrial lineup. Thus, the asserted conflict between Neil v. Biggers, supra, and the decision below, necessary for this Court to assert jurisdiction, does not exist.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

John R. Obenchain
1800 American National Bank Building
South Bend, Indiana 46601
Telephone: (219) 233-1194
Attorney for Respondent